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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

CAROLYN JEWEL, TASH HEPTING, YOUNG BOON HICKS, as executrix of the estate of GREGORY HICKS, ERIK KNUTZEN and JOICE WALTON, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

NATIONAL SECURITY AGENCY, *et al.*,

Defendants.

Case No.: 4:08-cv-4373-JSW

PLAINTIFFS' FINAL BRIEF RE: ENFORCEMENT OF EVIDENCE PRESERVATION ORDERS (PURSUANT TO THE COURT'S JUNE 6, 2014 ORDER)

Courtroom 5, 2nd Floor
The Honorable Jeffrey S. White

[HEARING DATE REQUESTED]

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Federal Statutes

Federal Rules

Legislative Materials

Other Authorities

I. INTRODUCTION

Litigants are under a duty to preserve all evidence potentially relevant to the claims brought against them. The government breached that duty, resulting in the loss of years of evidence: three years of the telephone records it seized between 2006 and 2009; five years of the Internet content it seized between 2007 and 2012; and seven years of the Internet records it seized between 2004 and 2011.

The only question now is what consequences should come from this breach. An adverse inference that the evidence would have demonstrated that plaintiffs' communications were included in those seized is an appropriate response. It ensures that plaintiffs are not harmed by the government's destruction of the best evidence they could have used to establish the fact of collection of their specific communications and records.

The court posed two questions during the June 6, 2014 hearing:

(1) Whether plaintiffs' claims encompass Section 702 and what is the scope of the collection activities under that provision;

(2) The appropriateness of an adverse inference for standing based upon the alleged destruction of documents collected pursuant to both Sections 215 and 702.

Civil Minute Order, June 6, 2014 (ECF No. 246).

On the first question, plaintiffs challenge the government's surveillance activities regardless of the government's legal rationale for the surveillance, whether that rationale is section 702 or otherwise. Plaintiffs' claims are not tied to, or limited by, the government's defenses of its conduct. Plaintiffs' claims encompass the collection of their communications and communications records via two methods: tapping into the Internet "backbone" via the fiberoptic cables of their Internet provider, AT&T, and the collection of their telephone records from their telephone provider, also AT&T. The government has now admitted that it employs each of these surveillance practices.[1] The government now claims FISA Amendments Act ("FAA") § 702 (50 U.S.C.

[1] While the government first revealed its Internet backbone collection activities in August 2013, it

§ 1881a) as an affirmative defense for its Internet backbone collection. But defendant's shifting defenses do not limit the scope of a complaint. This case is not a challenge to the statutes on which the government may base this defense or any other. Instead, it is a challenge to the government's surveillance practices regardless of any claimed statutory authorization or other defense.

On the second question, an adverse *factual* inference is a proper remedy for the harm caused by the government's destruction of evidence. Plaintiffs are not seeking an adverse inference on the *legal* conclusion of standing. They seek only the following factual inference: that the destroyed evidence would have shown that plaintiffs' communications and communications records were collected. These facts indeed do bear on standing. But standing remains an independent legal finding for this Court to make. The requested factual inference is entirely appropriate and well within this Court's authority. The inference simply seeks to ensure that plaintiffs are not harmed by the government's destruction of the very evidence that the government itself demands be produced in order for plaintiffs to maintain this litigation.

Regardless of the past dispute, the government's duty to preserve evidence going forward must include all evidence relevant to the full scope of plaintiffs' claims, including all evidence relating to the government's Internet backbone collection. However, if the Court adopts the adverse inference plaintiffs propose, it may obviate the ongoing need for the government to preserve the full range of evidence relating to its Internet backbone collection. In that case, the factual question of whether the mass surveillance includes plaintiffs' communications will be settled.

II. ARGUMENT

A. Plaintiffs Sued Over The Government's Mass Surveillance Activities At AT&T; All Evidence Relating To That Conduct Must Be Preserved.

The government has had a duty to preserve evidence related to its interception from the Internet backbone facilities of AT&T, along with the telephone records of the class of AT&T

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recently more directly explained that it collects "certain telephone and electronic communications through its 'upstream collection' as those communications 'transit the Internet backbone' within the United States." Gov't Reply Brief, ECF No. 253 at 7:12-14 (citations omitted). Plaintiffs challenge any and all collection from the Internet backbone, regardless of whether the government characterizes it as part of its "upstream collection" or gives it any other moniker.

customers, because the complaint plainly challenges the legality of that conduct.

The government asserts that it destroyed years of evidence because it did not realize that for the last six years plaintiffs have been suing about the government's ongoing surveillance activities.[2] Instead, the government claims it believed that plaintiffs filed suit in 2008 only to resolve the narrow legal question pertaining to surveillance authorized by presidential authority, which ended in 2004 for telephone records, 2006 for Internet metadata, and 2007 for Internet content.

The government's position that plaintiffs' lawsuit pertains only to past practices is not tenable. The complaint sufficiently alleges that the government is gaining custody of plaintiffs' communications from the Internet backbone facilities of AT&T such that it triggers the government's duty to preserve evidence of its continuing Internet backbone surveillance. In a section entitled "The NSA's Dragnet Interception Of Communications Transmitted Through AT&T Facilities," at paragraphs 50-81 of the complaint**,** plaintiffs describe in great detail the government activities by which their communications were intercepted from the Internet backbone facilities of AT&T ("AT&T's Common Backbone Internet network," Complaint, ECF No. 1 ¶ 58)—the activity the government now admits. Paragraph 64 states:

> By early 2003, AT&T—under the instruction and supervision of the NSA—had connected the fiberoptic cables used to transmit electronic and wire communications through the WorldNet Internet Room to a 'splitter cabinet' that intercepts a copy of all communications transmitted through the WorldNet Internet Room and diverts copies of those communications to the equipment in the SG3 Secure Room. (Hereafter, the technical means used to receive the diverted communications will be referred to as the "Surveillance Configuration.")

See also ¶¶ 58-59 (explaining that the intercepted fiberoptic cables are part of AT&T's Internet backbone). Paragraph 73 of the complaint specifically explains:

> Through this network of Surveillance Configurations and/or by other means, Defendants have acquired and continue to acquire the contents of domestic and international wire and/or electronic communications sent and/or received by Plaintiffs and class members, as well as non-content dialing, routing, addressing and/or signaling information pertaining to those communications.

[2] Importantly, the government does not renew its operational practicability argument made solely in its emergency papers of June 5 and 6. ECF No. 237 at 1:9-13; ECF 243 at 11:6-12:22.

Plaintiffs also allege that this behavior is ongoing and seek an injunction to stop it. *See*, *e.g.*, Complaint, ECF No. 1 ¶¶ 3, 9, 13, 14, 82 and Prayer for Relief ¶ B.

These allegations put the government on notice of the facts underlying plaintiffs' complaint. They far exceed the requirement of Federal Rule of Civil Procedure 8 of a short and plain statement of the claim showing that the pleader is entitled to relief. They are also more than sufficient to put the government on notice of what evidence it had a continuing duty to preserve.

Beyond the complaint, plaintiffs have consistently pursued their claims as a challenge to the government's ongoing conduct, as well as its past conduct. Plaintiffs have filed exhaustive evidence of the ongoing nature of the surveillance, even after the existence of the FISC orders became public, to ensure that the court remained abreast of what plaintiffs knew about the government's practices so that it could properly enter an order ending the illegal surveillance.[3] Plaintiffs have consistently described their claims as including ongoing government surveillance. This included lengthy filings in June 2009 and October 2012, in which plaintiffs explained the passage of the Protect America Act and the FISA Amendments Act but also noted, correctly, that nothing on the face of either statute authorizes mass surveillance via the Internet backbone. *See* ECF No. 30, Exh. A at 41, 46-50; ECF No. 113 at 38:11-43:28.

The government's characterization that "the *essence* of the alleged activities" is "the President's authorization, to the exclusion of any statutory or judicial authorization" (emphasis in original) ignores plaintiffs' lengthy factual allegations regarding backbone collection and the legal claims stated in the complaint. Gov't Reply Brief, ECF No. 253 at 12:17-19. The government also fails to address paragraphs 76, 92, 110, 120, 129, and 138 of the complaint. As set forth in

[3] However, the fact that the FISC authorized the two types of surveillance alleged in the complaint did not become public until June 5, 2013 with the publication of the FISC 215 Order for telephone records (*See* "Verizon forced to hand over telephone data – full court ruling" http://www.theguardian.com/world/interactive/2013/jun/06/verizon-telephone-data-court-order?guni=Article:in%20body%20link (last accessed July 17, 2014) and August 21, 2013, when the government partially declassified another FISC opinion referencing the Internet backbone surveillance. Office of the Director of National Intelligence, IC on the Record Tumbler page, "DNI Declassifies Intelligence Community Documents Regarding Collection Under Section 702 of the Foreign Intelligence Surveillance Act (FISA)," http://icontherecord.tumblr.com/post/58944252298/dni-declassifies-intelligence-community-documents (last accessed July 9, 2014).

plaintiffs' previous brief (ECF No. 233 at 13 n.10), those allegations are not limited to challenging presidentially authorized surveillance, but allege generally the unlawfulness of the government's conduct. Surveillance that is unconstitutional is unlawful whether or not it is carried out under color of a FISC order, just as a search pursuant to an unconstitutional search warrant is unlawful.

Similarly the government makes no sense with its claim that the complaint's phrases "without judicial, statutory, or other lawful authorization," "without judicial or other lawful authorization," "in violation of statutory and constitutional limitations," and "in excess of statutory and constitutional authority," means that plaintiffs do not challenge illegal collection occurring under FISC authority. *See* ECF No. 229 at 15:1-19:7. Allegations of "unlawful" activity encompass government's practices that are unconstitutional, or exceed the scope of the FISC orders, or go beyond what the statute allows. Those practices are not "lawfully authorized" activity.

The government also ignores the clear and unequivocal allegations that the "*acts*" of the defendants in intercepting plaintiffs' communications from the Internet backbone violate the Fourth Amendment: "By the acts alleged herein, Defendants have violated Plaintiffs' and class members' reasonable expectations of privacy and denied Plaintiffs and class members their right to be free from unreasonable searches and seizures as guaranteed by the Fourth Amendment to the Constitution of the United States." Complaint, ECF No. 1 ¶ 113.

As explained in plaintiffs' earlier brief (ECF No. 233 at 16-17), the government has repeatedly acknowledged that the evidence relating to plaintiffs' claims of indiscriminate content interception is not limited to evidence of surveillance conducted solely under presidential authority but extends as well to surveillance conducted under section 702. Most recently, in December 2013, NSA Deputy Director Fleisch stated under oath that: "*information . . . that may relate to or be necessary to adjudicate plaintiffs' claims* that the NSA indiscriminately intercepts the content of communications . . . includ[es]" not only "[i]nformation concerning the scope and operation of the now inoperative TSP" but also "[i]nformation concerning operational details related to the collection of communications *under FISA section 702*." 12/20/13 Fleisch Decl., ECF No. 227 ¶ 44 (emphasis added). This statement was not, as the government would now have it, simply a statement about the scope of information that might be revealed if litigation proceeded (*see* ECF

No. 253 at 14:7-17), but the government's description of the information directly relating to plaintiffs' claims. Fleisch also acknowledged that she understood plaintiffs' complaint as seeking relief that would prohibit both the past and ongoing surveillance: "Plaintiffs seek relief in this litigation that would prohibit such collection activities, even though they were later transitioned to FISC-authorized programs and remain so to the extent the programs continue." ECF No 227 at 19:13-15.

Finally, the government's claim that it believed the case challenged only past activity is belied by the fact that it has never argued mootness. To the contrary, it has actively defended this case for years, including a trip to the Ninth Circuit and the thousands of pages of briefing and evidence presented to this Court. The government has also never sought clarification from plaintiffs about the scope of their complaint or of its preservation duties. Most importantly, it has never sought an order of this court confirming its position about the scope of the complaint or its preservation duties.

B. The Fact That The Government Obtained Different Authority For The Same Practices Cannot Extinguish Plaintiffs' Broad Claims Against Those Practices.

By secretly shifting its legal defense from executive authority to FISC opinions, the Government did not cast its surveillance activities beyond the reach of the complaint.

An illustration may assist here. In a lawsuit seeking an injunction against an ongoing pattern and practice of unconstitutional searches by the police, the fact that the complaint made reference to a then-known consent defense asserted by the police would not render the complaint moot if the government shifted its defense from consent to the plain view doctrine while it continued conducting the illegal searches. Nor would the police be relieved of the duty to preserve evidence of the searches conducted under their new legal justification. The complaint is about the searches themselves, not about the possible affirmative defenses.

The same is true here. This case has always been about the government gaining custody over plaintiffs' communications and communications records through mass collection from the Internet backbone facilities of AT&T and through the mass collection of telephone records. When the case began, the government was asserting broad authority to surveil Americans based upon the

President's authorities under Article II of the Constitution. This purported justification was referenced in the complaint to provide as full a picture as possible to the court at that point in time. The government now maintains that the same collection practices from the Internet backbone are allowed by "Section 702 authority." Gov't Reply Brief, ECF No. 254-1 at 7:11-12.

But this later defense is irrelevant to the evidence preservation question. Any new affirmative defense asserted by the government cannot narrow the scope of plaintiffs' claims and cannot narrow the scope of the duty to preserve evidence, especially while the underlying practices continue. The government may have been within its power to assert an additional argument for why its Internet backbone surveillance was legal. But its shift in legal justifications did not terminate plaintiffs' claims, since they were based on the actual surveillance practices, not those justifications. And it certainly did not alter the defendants' preservation obligations.

Contrary to the government's assertion, plaintiffs were not aware that section 702 was the government's secret justification for its indiscriminate mass collection until August 2013, when the government declassified and published a FISC order discussing the surveillance.[4] The government errs in asserting that as of 2008, when the complaint was filed, it had publicly acknowledged mass collection from the Internet backbone under color of FISC orders. *See* Gov't Reply Brief, ECF No. 254-1 at 11:8-9 ("publicly disclosed programs that Plaintiffs have long known about yet failed to challenge in their complaints"); *see also id.* at 16-18. The January 17, 2007 notice asserting that the TSP was now being conduct pursuant to FISC orders was not notice of Internet backbone surveillance. Indeed, plaintiffs immediately told the Court that these TSP orders could not include the mass surveillance they were suing over because FISA as it then stood did not authorize mass surveillance. Plaintiffs' Opposition to Motion to Stay, ECF No. 128 at 3-4 n. 2. *In re NSA Telecommunications Records Litigation*, 483 F. Supp. 2d 934 (2007) (MDL Docket No. 06-cv-1791-VRW). The government provides no evidence, and there is none, that in discussing the TSP in January 2007, or at any time, the government admitted Internet backbone surveillance. And of

[4] *See* IC on the Record post of Aug. 21, 2013, *available at* http://icontherecord.tumblr.com/post/58944252298/dni-declassifies-intelligence-community-documents.

course in 2007 the FISC only had authority to issue traditional FISA orders that could not lawfully have included mass surveillance.

Nor did the passage of FAA section 702 in July 2008 put plaintiffs on notice that the Internet backbone surveillance was now the subject of a FISC order. The government never announced that it was collecting communications from the Internet backbone under color of FISC orders issued under section 702. To the extent that the existence of some sort of FISC orders were public, plaintiffs had already made clear their position that no FISC orders could constitutionally authorize the Internet backbone surveillance.[5] Moreover, the mere passage of section 702 gave no notice of when the FISC might issue orders under that statute or whether the government would conduct its Internet backbone surveillance under color of 702 orders–the orders under the previous temporary law, the Protect America Act (which like 702 orders were good for one year) continued in effect even after the FAA's enactment, per section 404 of the FAA. Pub. L. No. 110-261, § 404, 122 Stat. 2474 (2008).

The government's positions are internally inconsistent. The government asserts that section 702 of FISA involves "publicly disclosed programs that plaintiffs have long known about yet failed to challenge in their complaints." Gov't Reply Brief, ECF No. 254-1 at 11:7-9. Yet it also asserts that it could not ask plaintiffs whether their claims encompassed Internet backbone collection under section 702 because that collection had not been acknowledged by the government. *Id.* at 13:16-22. Either the government had disclosed it was conducting Internet backbone collection under color of FISC orders issued under section 702, or it was a secret. But not both.

It was a secret. None of the limited public information available in 2008 about section 702 reasonably put the public, or the plaintiffs, on notice that the government now believed that it could conduct *Internet backbone surveillance* under FISC orders issued pursuant to section 702. To the contrary, the statute itself contains no hint that it can be used to authorize indiscriminate mass

[5] *Jewel v. NSA*, Plaintiff-Appellees' Reply Br. at 24 n.9, cited in Plaintiffs' Brief, ECF No. 233 at 15.

interception and searching of communications, much less that this would be occurring through Internet backbone collection within the United States, as alleged in the complaint. Thus, plaintiffs rightly pointed out to the Ninth Circuit that section 702 could not justify the mass and indiscriminate surveillance alleged in the complaint. *See* Plaintiff's Brief, ECF No. 233 at 15:3-15.

As noted above, the government did not admit its position that it believed section 702 authorized its Internet backbone collection until August 2013 when it unsealed a FISC opinion referencing it. *See supra,* note 3. And it only very recently provided significant operational details. Gov't Reply Brief, ECF No. 253 at 5:12-10-8.

Finally, the government's lengthy merits defense of its section 702 collection practices and policies is irrelevant to this evidence preservation question. An evidence preservation motion is not the proper forum for arguing the merits of a lawsuit.

C. The Government Spoliated Evidence, And Continues To Do So.

The parties do not dispute that the government has knowingly destroyed three years of the telephone records it seized between 2006 and 2009, five years of the content it collected between 2007 and 2012, and seven years of the Internet records it seized between 2004 and 2011, plus further destruction since the Court issued its TRO in March 2014. Declassified Shea Decl. ¶¶ 33, 35-38, ECF No. 228 (destruction of content and telephone records); 12/20/13 Fleisch Decl. n.32, ECF No. 227 (destruction of Internet records); Cohn Decl., ECF No. 235-1, Exhibits A-E (emails between parties' counsel discussing destruction since March 2014); Ledgett Decl. ¶ 2, ECF No. 244, Exhibit A (asserting that "it would not be possible for the NSA to immediately preserve all Section 702 data in accordance" with Court's June 5, 2014 order).

This destruction of evidence is spoliation if (1) the government, the party with control over the evidence, had an obligation to preserve it at the time of destruction; (2) the evidence was destroyed with a "culpable state of mind"; and (3) the evidence was relevant to a party's claim or defense. *Zubulake v. UBS Warburg, LLC* ("*Zubulake IV*"), 220 F.R.D. 212, 220 (S.D.N.Y. 2003); Gov't Br. re: Evid. Preservation (ECF No. 253) at 19 (citing *Domingo v. Donahoe*, 2013 WL 40400913, at *4 (N.D. Cal. Aug. 7, 2013) for the same test).

All three factors are present here. The government invokes no sound authority in arguing otherwise.

As explained above, the first and third factors are met. The government had the duty to preserve the evidence, and the evidence is, at a minimum, directly relevant to the issue of the plaintiffs' standing, under the government's theory of standing.[6] The government's contention that it knew that the plaintiffs were suing over its Internet backbone surveillance but had no idea that plaintiffs were suing over that exact same behavior when it continued, unabated, under FISC orders, is simply not credible. *Supra* Gov't Reply Brief, ECF No. 253; Pl.s' Opening Brief re: Evid. Preservation, ECF No. 233 at 10-14.

With respect to the second factor, the government destroyed evidence with a sufficiently culpable state of mind. *See* Pl.s' Opening Brief, ECF No. 233 at 20. The government's argument that a party lacks culpability if it destroys evidence pursuant to a records retention policy—it likens the FISC order to such a policy—must be rejected. The cases it offers in support involve parties that destroyed evidence *before* litigation commenced or without any knowledge that litigation was pending. Gov't Reply Brief, ECF No. 253 at 20 (citing *Pirv v. Glock, Inc.*, 2009 WL 54466, at *5 (D. Or. Jan. 8, 2009) (evidence was destroyed by a third party with no knowledge of pending litigation); *Brock v. County of Napa*, 2012 WL 2906593 (N.D. Cal. July 16, 2012) (evidence was destroyed three months before the claims at issue even arose)). Here, in contrast, the destruction of evidence began *after* litigation began and has continued for the entire lifetime of this litigation. The government had clear notice of the material at issue from January 2006, when *Hepting* was filed, and was under continuous preservation orders since October 2007, first under the MDL and then under the preservation order issued in this case.

The government's main assertion for lack of culpability, that the FISC made it destroy evidence, is misleading. *See e.g.* Gov't Reply Brief, ECF No. 253 at 21:6-9. The assertion elides that the government has presented no evidence that it even informed the FISC of the preservation orders in this case or the MDL, much less received direct approval of its position that those orders

[6] Plaintiffs have never agreed that the government's theory of standing is correct.

did not require it to preserve evidence after the FISC orders were entered. And of course the government received no such permission from this Court, which is the only one with jurisdiction to ensure that relevant evidence in this case is preserved.

The government also omits that earlier this year, in the context of its mass telephone records collection, the FISC excused the government from destroying relevant telephone records evidence for this case and similar cases, once *plaintiffs* notified the FISC of the government's preservation obligation in this Court and this Court's preservation orders. March 12, 2014 FISC Order, ECF No. 191, Exh. A. The FISC also ordered the government to show cause why it had not earlier notified the FISC of the potential scope of the orders. March 21, 2014 FISC Order, ECF No. 202 at 12-13. If a FISC order compelling the government to destroy evidence even potentially conflicted with this Court's evidence preservation orders, the government, like any other litigant, should have brought that to the attention of the parties and to the two relevant courts. Moreover, even if the government had appropriately notified the FISC prior to its approval of the government's retention plans, the FISC cannot overrule this Court's previous preservation orders.

The government's argument that its spoliation is excusable because its failure to produce evidence is "properly accounted for" by FISC minimization requirements rests on an equally flimsy foundation. Gov't Reply Brief, ECF No. 253 at 21:20. The government's purported authority for such a proposition actually suggests precisely the opposite. *Lewy v. Remington Arms Co.,* 836 F.2d 1104, 1112 (8th Cir. 1988), held that even if a party destroys evidence per a reasonable document destruction policy, the party should have nonetheless preserved the evidence if it "knew or should have known that the documents would become material at some point in the future." A party "cannot blindly destroy documents and expect to be shielded by a seemingly innocuous document retention policy." *Id*. *Bull v. UPS,* 665 F.3d 68 (3d Cir. 2012), is similarly inapposite. That case did not consider evidence preservation; to the contrary, the district court found bad faith and issued terminating sanctions when the plaintiff failed to produce evidence. The Third Circuit overturned the district court's findings because the defendant had never formally sought the evidence and any failure to produce was based upon a misunderstanding of the evidence rules by the individual plaintiff. Indeed, the court suggested that an adverse inference would have

been both appropriate and preferable to terminating sanctions: "such an instruction would have bolstered the very portion of [defendant's] case that it says suffered because it lacked the original." *Id*. at 82. The same is true here.

D. An Adverse Inference As To Facts That Establish Standing Is Not Beyond This Court's Discretion.

Plaintiffs request that this Court grant an adverse inference about a fact: "that the destroyed evidence would have shown that the government has collected plaintiffs' communications and communications records." Plaintiffs' Brief, ECF No. 233 at 22:1-3; *see also id.* at 20:15-16. This is an inference of fact, not of law.

Thus, in answer to the court's second question, plaintiffs do not seek an inference of standing, they seek an inference about a fact—that plaintiffs' telephone records, Internet records and Internet content were in fact collected by the government—that may be useful to the court in determining standing.

Standing requires three elements: 1) the plaintiff must have suffered an injury in fact; 2) the plaintiff's injury must be fairly traceable to the actions of the defendant; and 3) the relief requested in the suit must redress the plaintiff's injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Plaintiffs do not ask this Court to presume all three elements of standing or to make any conclusions as a matter of law, or to otherwise presume its Article III jurisdiction. Instead, they ask this Court to adopt the inference that plaintiffs' records have been collected, a fact that can support a finding that plaintiffs have suffered an injury in fact. This is exactly the type of factual inference that is appropriate to remedy spoliation.

It is well-established that although parties cannot stipulate to jurisdiction, they can stipulate to facts that establish jurisdiction. *See*, *e.g.*, *EEOC v. Serv. Temps Inc.,* 679 F.3d 323, 330 (5th Cir. 2012) ("Stipulations alone cannot confer jurisdiction, but they can form the factual basis for jurisdiction, as one does here."). In *Gibson v. Chrysler,* 261 F.3d 927, 948 (9th Cir. 2001), the Ninth Circuit correctly distinguished between a permissible adverse inference of a jurisdictional fact and a court's improper assumption of jurisdiction by consent: "[A] sanction in the form of an adverse factual finding rests on neither consent nor waiver." "[W]e see no reason why a court

cannot, in an appropriate case, sanction a defendant who refuses to respond to appropriate discovery requests on a fact relevant to subject matter jurisdiction by entering an order establishing that fact as true." *Id*. As the government itself highlighted, the *Gibson* court found that "a sanction in the form of an adverse factual finding . . . rests on the reasonable assumption that the party resisting discovery is doing so because the information sought is unfavorable to its interest. In such a case, the sanction merely serves as a mechanism for establishing facts that are being improperly hidden by the party resisting discovery." *Id. See also Cyntegra, Inc. v. IDEXX Labs., Inc.*, 322 F. App'x 569, 572 (9th Cir. 2009) (confirming that the defendant had been prejudiced by the destruction of evidence in its ability to challenge standing, and permitting an adverse inference instruction as to that factual evidence).

The government cites no precedent for the proposition that the requested factual inference is beyond this Court's discretion.[7] The Ninth Circuit in *Gibson* found that *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982), was consistent with its analysis. 261 F.3d at 948. In *Ireland*, the Supreme Court held that an adverse inference sanction could be used to establish personal jurisdiction. It distinguished that adverse inference from an attempt to establish subject-matter jurisdiction by consent. 456 U.S. at 702-04. However, the Court made no suggestion that jurisdictional facts could not be established by an adverse inference, just as jurisdictional facts may be established by stipulation, by an admission in an answer to the complaint, by an admission to a Rule 37 request for admission, or by other means short of a contested trial. *See Pittsburgh, C. & St. L.R. Co. v. Ramsey*, 89 U.S. 322, 327 (1874) (explaining that "the parties may admit the existence of facts which show jurisdiction, and the courts may act

[7] The Government cites several cases that relate to establishing a court's jurisdiction to hear a case. None of these cases inform the question at hand—an adverse inference as to certain facts that can support a finding of standing. *A-Z Int'l v. Philips*, 323 F.3d 1141 (9th Cir. 2003) (finding that the action at issue did not qualify as disobedience of lawful process and thus could not be the source of subject-matter jurisdiction); *Grupo Dataflux v. Atlas Global, L.P.*, 541 U.S. 567 (2004) (finding that a diversity jurisdiction deficit that existed at the time of filing could not be solved later when the citizenship of the parties changed); *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998) (funding that a court could not establish hypothetical jurisdiction in order to reach the merits of the case).

judicially upon such an admission"); *I.L. v. Alabama*, 739 F.3d 1273, 1284 (11th Cir. 2014) (same); *EEOC v. Serv. Temps Inc.,* 679 F.3d at 330 (holding that stipulations can form the factual basis for jurisdiction). Indeed, in both *Ireland* and *Gibson*, the Court allowed an adverse inference to establish certain facts that were not available because of spoliation or bad faith. *See Ireland*, 456 U.S. at 707-09; *Gibson*, 261 F.3d at 948.

III. CONCLUSION

We answer the court's two questions as follows:

First, plaintiffs' claims include ongoing surveillance practices due to the collection of telephone records, Internet records, and the content of their communications from the Internet backbone. The claims persist regardless of the government's having secretly shifted its purported authorization for these practices from purely presidential authority to FISC orders under sections 702 or 215 or otherwise. The evidence must be preserved regardless of whether the government is now using section 702 as a claimed basis for these practices.

Second, the government has spoliated evidence for telephone records, Internet records and Internet content and an appropriate remedy is for the court to issue an adverse inference of fact—that the destroyed evidence would have shown that the government has collected plaintiffs' communications and communications records. Importantly, plaintiffs are not asking this court to infer any conclusion of law or to assume jurisdiction.

An adverse inference would also answer the government's assertion in its emergency motions (not renewed in its reply) that its intake of communications is so massive that to require it to keep everything it initially collects would essentially choke it. With such an inference in place, the government can continue its current destruction policies without risking harm to plaintiffs.

Dated: July 18, 2014

Respectfully submitted,

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